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NO. _____

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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1982

SAMUEL THOMAS RICKMAN,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

On Appeal From the Supreme Court of Georgia

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Did the Georgia Court of Appeals, as upheld by the Georgia Supreme Court, err in holding that the Georgia parties-to-a-crime statute was constitutionally valid, despite Appellant's argument that the statute was unconstitutional on its face and in its application to this Appellant? *

* The parties to the proceedings in the Georgia Courts were Samuel Thomas Rickman, Appellant and the State of Georgia, by and through the District Attorney for the Cobb Judicial Circuit, Appellee. Additionally, though not a party below, this appeal was served on the Attorney General for the State of Georgia. There were two co-Defendants at Appellant's case below, one of whom, Rodney Wayne Ellis, has filed a Petition for a Writ of Certiorari with this Court.

SUBJECT INDEX

	Page
Table of Authorities	iii
Jurisdictional Statement	1
Opinions Below	2
Jurisdiction	2
Question Presented	4
Statutes and Constitutional Provisions Involved	4
Statement of the Case	5
The Questions Are Substantial	9
A. It is a denial of due process and equal protection under the Fifth and Fourteenth Amendments to the Constitution of the United States, for the Court of Appeals of Georgia to refuse to address a constitutional objection raised by an Appellant, based on an unsubstantiated, conclusory statement that the constitutional issue was not precisely presented below in the format desired by the Court of Appeals, and that threshhold question is an important and proper constitutional matter to be resolved by this Court	9
B. The Georgia parties-to-a-crime statute is unconstitutionally vague, indefinite and overbroad	17
C. Where there is an ambiguity in a criminal statute, it must be construed in favor of the accused. Failure to do so violates due process and equal protection	20

SUBJECT INDEX
(Cont'd.)

Page

D. The Georgia Appellate Courts are subjecting this Appellant to an improper application of the Georgia parties-to-a-crime statute because they are using it as a general conspiracy statute, contrary to legislative intent and in violation of this Appellant's Federal Constitutional rights 22

E. The Georgia Court of Appeals and Supreme Court are applying the parties-to-a-crime statute against this Appellant in an unconstitutional manner, by way of utilizing said statute as a reason to deny Appellant a severed trial 29

Conclusion 31

Certificate of Service 33

Appendix "A" - Opinion of Georgia Court of Appeals in Samuel Thomas Rickman v. State of Georgia, 164 Ga.App. 366, 296 S.E.2d 726 (1982)

Appendix "B" - Denial by Supreme Court of Georgia of Petition for Writ of Certiorari and Motion for Reconsideration in Samuel Thomas Rickman v. State of Georgia

Appendix "C" - Georgia Parties-to-a-Crime and Conspiracy Statutes

Appendix "D" - Former Georgia Statutes on Accessories and Principals

Appendix "E" - Notice of Appeal

TABLE OF AUTHORITIES

Page

Cases

Bell v. United States, 344 U.S. 81 (1955) 8

Benefield v. Malone, 110 Ga.App. 607, 139 S.E.2d 500 (1964) 22

Brooks v. State, 141 Ga.App. 725, 234 S.E.2d 541 (1977) 28

Brotherhood of Locomotive Firemen & Enginemen v. Northern Pac. Ry., 274 F.2d 641 (8th Cir. 1960) 21

Caldwell v. State, 227 Ga. 703, 182 S.E.2d 789 (1971) 25

Cohen v. California, 403 U.S. 15 (1971) 4

Cook v. State, 141 Ga.App. 240, 233 S.E.2d 60 (1977) 22

Corbin v. State, 212 Ga. 231, 91 S.E.2d 764 (1956) 11

Corley v. State, 154 Ga.App. 301, 268 S.E.2d 76 (1980) 10, 16

Crosby v. State, 232 Ga. 599, 207 S.E.2d 515 (1974) 24

Curtis v. State, 150 Ga.App. 507, 258 S.E.2d 247 (1979) 25

Donaldson v. State, 134 Ga.App. 755, 216 S.E.2d 645 (1975) 25

Douglas v. Alabama, 380 U.S. 415 (1965) 14, 16

Dutton v. State, 228 Ga. 850, 188 S.E.2d 794 (1972) 27

Evans v. State, 161 Ga.App. 468, 288 S.E.2d 726 (1982) 26

TABLE OF AUTHORITIES
(Cont'd.)

	Page
Fincher v. State, 211 Ga. 89, 84 S.E.2d 76 (1954)	25
Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962).	20
Gunter v. State, 243 Ga. 651, 256 S.E.2d 341 (1979)	27
Hamby v. State, 158 Ga.App. 265, 279 S.E.2d 715 (1981)	24, 27
Harvey v. State, 233 Ga. 41, 209 S.E.2d 587 (1974)	27
Henry v. Mississippi, 379 U.S. 443 (1965)	12, 16
Hogan v. State, 224 Ga. 419, 162 S.E.2d 408 (1968)	11
Hollowell v. Jove, 247 Ga. 678, 279 S.E.2d 430 (1981)	22
Hughes v. State, 150 Ga.App. 90, 256 S.E.2d 634 (1979)	24
Ladner v. United States, 358 U.S. 169 (1958)	21
Liner v. Jafco, Inc., 375 U.S. 301 (1964)	12
Love v. Griffith, 266 U.S. 32 (1924)	12
Matthews v. Everett, 201 Ga. 730, 41 S.E.2d 148 (1947)	20
Ornelas v. United States, 236 F.2d 392 (9th Cir. 1956)	22
Paras v. State, 247 Ga. 75, 274 S.E.2d 451 (1981)	20

TABLE OF AUTHORITIES
(Cont'd.)

	Page
Rayle Electric Membership Corp. v. Cook, 195 Ga. 734, 25 S.E.2d 574 (1943). . . .	22
Rickman v. State, 164 Ga.App. 366, 296 S.E.2d 726 (1982)	passim
Sale v. Leachman, 218 Ga. 834, 131 S.E.2d 185 (1963)	22
Salinas v. United States, 277 F.2d 914 (9th Cir. 1960)	27
Scott v. State, 229 Ga. 541, 192 S.E.2d 367 (1972)	24. 27
Sentell v. State, 227 Ga. 153, 179 S.E.2d 234 (1971)	25
Shaver v. United States, 174 F.2d 618 (9th Cir. 1949)	21
Staub v. City of Baxley, 355 U.S. 313 (1958)	14
Stinson v. State, 151 Ga.App. 533, 260 S.E.2d 407 (1979)	25
Tenant v. State, 243 Ga. 595, 256 S.E.2d 382 (1979)	11
Thrall v. State, 226 Ga. 308, 174 S.E.2d 925 (1970)	11
United States v. Collins, 552 F.2d 243 (8th Cir. 1977)	25
United States v. Girst, 645 F.2d 1014 (D.C. Cir. 1979)	8
United States v. Walter, 484 F.Supp. 183 (S.D. Ga. 1980)	21
United States v. Weitzel, 246 U.S. 533 (1917)	21

TABLE OF AUTHORITIES
(Cont'd.)

	Page
Ventimiglia v. United States, 242 F.2d 620 (Cir. 1957)	21
Wanzer v. State, 232 Ga. 523, 207 S.E.2d 466 (1974)	10, 17
Whitus v. Balkom, 333 F.2d 496 (5th Cir. 1964)	14
Whitus v. Georgia, 385 U.S. 545 (1967)	14
Wood v. State, 219 Ga. 509, 134 S.E.2d 8 (1963)	21
Wright v. Georgia, 373 U.S. 284 (1963)	14, 16
Constitutions	
U.S. Const., Am. V	passim
U.S. Const., Am. VI	passim
U.S. Const., Am. XIV	passim
Statutes	
28 U.S.C. § 1257(2)	4
Ga. Code Ann. § 26-501	19
Ga. Code Ann. § 26-502	19
Ga. Code Ann. § 26-601	19
Ga. Code Ann. § 26-602	19
Ga. Code Ann. § 26-604	19
Ga. Code Ann. § 26-801 (O.C.G.A. § 16-2-20)	passim
Ga. Code Ann. § 26-802 (O.C.G.A. § 16-2-21)	passim

TABLE OF AUTHORITIES
(Cont'd.)

	Page
Ga. Code Ann. § 26-3201 (O.C.G.A. § 16-4-8)	5, 23
Ga. Code Ann. §§ 79A-8, et seq. (O.C.G.A. §§ 16-3-1, et seq.)	2
Ga. Code Ann. § 79A-812 (O.C.G.A. § 16-13-33)	5, 23

Other Authorities

42 C.J.S. Indictments, § 295, p. 1324	27
82 C.J.S. Statutes, § 389, p. 928	21
Committee Notes, Chapter 26-8, Ga. Code Ann. (1968)	23

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OCTOBER TERM, 1982

SAMUEL THOMAS RICKMAN,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

On Appeal From the Supreme Court of Georgia

JURISDICTIONAL STATEMENT

Appellant, SAMUEL THOMAS RICKMAN, appeals from the judgment of the Supreme Court of Georgia entered on January 25, 1983, which, by virtue of not granting a Petition for Writ of Certiorari to review the Opinion of the Court of Appeals of Georgia which affirmed Appellant's conviction below, did in fact affirm his conviction for violation of the Georgia Controlled Substances Act. This Jurisdictional Statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are present.

OPINIONS BELOW

The Opinion of the Court of Appeals of Georgia, entered on October 18, 1982, being Case No. 63999, is published at 164 Ga.App. 366, 296 S.E.2d 726 (1982). A copy of that Opinion is attached hereto as Appendix "A."

The denial of a Petition for Writ of Certiorari, as applied for by Appellant following the aforesaid decision of the Court of Appeals and his Motion for Rehearing to that Court, entered on January 25, 1983, is unpublished. A copy of that denial is attached hereto as Appendix "B."

JURISDICTION

Pursuant to Indictment dated November 5, 1979, returned by the Grand Jury for Cobb County, Georgia, Appellant was tried and convicted by a jury in the Superior Court of Cobb County, the Honorable John W. Williford, Senior Judge, Georgia Superior Courts, presiding, of violation of the Georgia Controlled Substances Act, Ga. Code Ann. §§ 79A-8, et seq. (now O.C.G.A. §§ 16-3-1, et seq.) on February 16, 1981. Appellant was sentenced to serve seventeen years, with twelve years to be served in prison and five years on probation.

At the conclusion of presentation of evidence and argument by counsel, the jury which convicted Appellant was charged on the law of parties-to-a-crime, Ga. Code Ann. §§ 26-801, 26-802 (now O.C.G.A. §§ 16-2-20, 16-2-21), over objection by defense counsel. On Motion for New Trial, and in his appeal below, Appellant argued that the aforesaid Georgia parties-to-a-crime statute was unconstitutional, both on its face and as applied to this Appellant and others similarly situated. The Court of Appeals of Georgia, which rendered a written Opinion in this case, held that the parties-to-a-crime statute was constitutional and that it had consistently been held constitutional by the appellate Courts of the State of Georgia. See, Division No. 13, Georgia Court of Appeals Opinion, 164 Ga.App. 366, 372, 296 S.E.2d 726 (1982), attached hereto as Appendix "A." Moreover, the Georgia Court of Appeals affirmed the use of the parties-to-a-crime statute as rationale for denying Appellant's Motion for Severance and related issues at trial. See, Division Nos. 6 and 8, Georgia Court of Appeals Opinion, id., 164 Ga.App. 366, 368-370. Additionally, the Georgia Court of Appeals, in its Opinion below, further misconstrued and misapplied, in an unconstitutional manner, the Georgia parties-to-a-crime statute in Division 6 of its Opinion,

id., 164 Ga.App. 366, 368-369, in treating the parties-to-a-crime statute as if were the same as or akin to the Georgia conspiracy statute(s). These contentions of Appellant were held to be without merit by the Court of Appeals of Georgia, and by the Supreme Court of Georgia in refusing to grant a Writ of Certiorari to review the Court of Appeals opinion, which affirmed Appellant's conviction.

Jurisdiction to review the decision of the Supreme Court of Georgia is conferred on this Court by Title 28, United States Code, Section 1257(2). Cohen v. California, 403 U.S. 15, 18 (1971).

QUESTION PRESENTED

Did the Georgia Court of Appeals, as upheld by the Georgia Supreme Court, err in holding that the Georgia parties-to-a-crime statute was constitutionally valid, despite Appellant's argument that the statute was unconstitutional on its face and in its application to this Appellant?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This appeal involves the Georgia parties-to-a-crime statute, Sections 26-801 and 26-802, Georgia Code

Annotated (now O.C.G.A. §§ 16-2-20 and 16-2-21); the Georgia conspiracy law, Section 26-3201, Georgia Code Annotated (now O.C.G.A. § 16-4-8); and the Georgia conspiracy to commit drug offenses statute, Ga. Code Ann. § 79A-812 (now O.C.G.A. § 16-13-33). These statutes are set forth verbatim in Appendix "C."

This appeal involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America, alleging deprivation of Appellant's rights to due process of laws, effective assistance of counsel and equal protection of the laws.

STATEMENT OF THE CASE

Appellant was convicted of violating the Georgia Controlled Substances Act; specifically, possession with intent to distribute cocaine. Appellant was so charged in one Count of a two-Count Indictment, being No. 79-2007 (Cobb County, Georgia). He was charged with no other offense.

Appellant was indicted jointly in said Indictment with Rodney Wayne Ellis and Robert Marion Hoskins, both of whom went to trial with this Appellant as co-Defendants, despite each of these three co-Defendants having moved repeatedly for severance and separate trials, and after a fourth co-Defendant, Brenda Elaine

Klutz, entered a plea prior to trial. All three remaining co-Defendants, including Appellant, were convicted by a jury in the Superior Court of Cobb County on February 16, 1981, and sentenced thereafter to identical sentences, namely twelve years to serve and five years on probation.

In essence, this case involved the sale of a contraband substance, cocaine, allegedly as between the co-Defendants, including Appellant, and an informant and an undercover agent of the Cobb County Police Department. The one co-Defendant who was the "go-between" was Robert Marion Hoskins. Hoskins pled entrapment.

Appellant RICKMAN filed a pre-trial Motion to Sever, even before knowledge that co-Defendant Hoskins would plead entrapment. The Trial Court, on hearing pre-trial Motions, denied the Motion to Sever. Thereafter, and especially after knowledge that co-Defendant Hoskins would plead entrapment and admit the offense, Appellant and co-Defendant Ellis repeatedly argued for severance; they did this during trial, on Motion for a Directed Verdict of Acquittal, at the close of the State's evidence, and at the close of all the evidence. Both Appellant and co-Defendant Ellis sought to have the Trial Court charge the jury explicitly that

it was not to consider any evidence adduced against Hoskins or any other person after each had rested his case. The Trial Court refused to give these curative instructions, relying instead on a standard, general charge that the jury was to consider each co-Defendant individually.

The facts at the trial, not in dispute, established that the alleged drug deal "went down" at a motel in Cobb County, Georgia. The informant and undercover agent were located in one motel room, and, at the time of the arrest, Appellant and co-Defendant Ellis were located in an adjacent room at the motel. The co-Defendant who pled entrapment, Hoskins, was found in the motel room with the undercover agent and the informant at the time of the arrest. Also found in that room was approximately one pound of cocaine. This cocaine formed the gravamen of the possession with intent to distribute charge against Appellant, which is the only offense charged to him in the Indictment.

The District Attorney, as one of his requested charges to the jury, sought to have Appellant Rickman and the other co-Defendants charged not only with the violation of the Georgia Controlled Substances Act as in the Indictment, but also as parties to a crime pursuant to Ga. Code Ann. §§ 26-801 and 26-802 (now O.C.G.A.

§§ 16-2-20 and 16-2-21)(Appendix "C"). Although the Trial Court did not use the language of the parties-to-a-crime statutes verbatim, the Court did essentially charge the jury that they could convict Appellant and the co-Defendants as parties to a crime even if, as the statute provides, the jury were to find that they did not directly commit the crime.[1] This charge to the jury was given over objection to the charge by counsel for Appellant's co-Defendant Ellis, and by trial counsel for this Appellant. This objection by defense counsel followed numerous objections throughout the course of the trial relating to allowing evidence to go to the jury as to co-Defendant Hoskins, who pled entrapment and admitted the offense while testifying that Appellant RICKMAN had nothing to do with the offense, and

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[1] This scenario is itself problematic, in that a person can be charged with directly commiting the substantive crime and also, the way Georgia prosecutors are wont to use the parties-to-a-crime law, as a party to a crime which includes by its terms "a person [who] directly commits the crime." Ga. Code Ann. § 26-801(b)(1). By allowing the jury to be charged both ways, the State is being allowed to go against the Appellant on two distinct penal statutes -- the drug violation and parties-to-a-crime -- for the very same transaction and same offense. This it cannot do. United States v. Girst, 645 F.2d 1014, 1017 (D.C. Cir. 1979). See also, Bell v. United States, 349 U.S. 81 (1955).

numerous objections by defense counsel that their trials should be severed from the co-Defendants.

In its written Opinion dated October 18, 1982, at Division 13, the Court of Appeals, citing earlier Georgia case law, holds that the parties-to-a-crime statute is constitutional. Op cit., 164 Ga.App. 366, 372 (Appendix "A"). For that finding and numerous other findings as raised by each co-Defendant, the Georgia Court of Appeals affirmed the convictions of this Appellant and each co-Defendant.

Appellant petitioned the Georgia Court of Appeals for a rehearing, which was denied on November 12, 1982, and then petitioned the Supreme Court of Georgia for a Writ of Certiorari, which was refused on January 5, 1983, as was a Motion for Reconsideration on January 25, 1983, thereby affirming the Court of Appeals' affirmation of Appellant's conviction.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. It is a denial of due process and equal protection under to the Fifth and Fourteenth Amendments to the Constitution of the United States, for the Court of Appeals of Georgia to refuse to address a constitutional objection raised by an Appellant, based on an unsubstantiated, conclusory statement that the constitutional issue was not precisely presented below in the format desired by the Court of Appeals, and that threshhold question is an important and proper constitutional matter to be resolved by this Court.

Both the District Attorney, in his Reply Brief to Appellant's appeal to the Georgia Court of Appeals, and in its Opinion dated October 18, 1982, the Court of Appeals concludes baldly that "because Appellant made no constitutional objection to either the charge [on parties-to-a-crime] or the statute [id.] at trial, we will not address his enumeration [contesting the constitutionality on its face and as applied of the parties-to-a-crime statute] other than to note that the Supreme Court held that Code Ann. §§ 26-801 and 802 were not unconstitutionally vague, indefinite and overbroad in Wanzer v. State, 232 Ga. 523(6) (207 S.E.2d 466)." (Appendix "A"; 164 Ga.App. 366, 372).

In the State's Brief to the Court of Appeals, the District Attorney cites no authority whatsoever for his statement that trial counsel's objections to the charges to the jury, including parties-to-a-crime, was not sufficient to raise a constitutional attack. In its affirmation of that assertion by the District Attorney, the Court of Appeals, as set forth supra, simply repeats that supposed precept of law. The only authority apparently in support of its position, as set forth in Division 13 of the Court of Appeals Opinion (Appendix "A") is Corley v. State, 154 Ga.App. 301(2), 268 S.E.2d 76 (1980). The Corley opinion states merely

that "constitutional issues first raised on appeal present nothing for our decision. Tenant v. State, 243 Ga. 595 (255 S.E.2d 710) [sic]"; the Opinion sets forth absolutely no other authority or law. The Opinion rendered by the Georgia Supreme Court in Tenant v. State, 243 Ga. 595, 256 S.E.2d 382 (1979), does not go to the issue of whether the Georgia Court of Appeals may entertain an issue raised first on appeal, but rather stands merely for the proposition that a constitutional issue not raised during the trial of the case but in a Motion for New Trial, properly goes to the Court of Appeals rather than to the Supreme Court of Georgia. Id. The Georgia Supreme Court in Tenant, id., refers merely to its earlier opinion in Thrall v. State, 226 Ga. 308, 174 S.E.2d 925 (1970), which simply restates the opinion in Tenant, without further elaboration or differing authority, citing Hogan v. State, 224 Ga. 419, 162 S.E.2d 408 (1968) and Corbin v. State, 212 Ga. 231, 91 S.E.2d 764 (1956) (the statute attacked in Corbin was later found to be unconstitutional).

Thus, the State has failed to set forth any clearly enunciated rule with regard to raising constitutional attacks on State statutes in a timely manner, other than by the aforecited conclusions of law. Much less does Georgia make any showing of a legitimate State interest

in denying an Appellant the right to have the highest Courts of the State of Georgia consider the constitutionality of a State statute. Henry v. Mississippi, 379 U.S. 443, 447 (1965). This Supreme Court of the United States has jurisdiction over appeals attacking the constitutional validity of State statutes, when a decision of the highest Court of that State has found such statute valid. 28 U.S.C. § 1257(2).[2] Whether or not such appeal so presented is properly before the Court is itself a constitutional issue over which this Court has jurisdiction. Henry v. Mississippi, id., citing Love v. Griffith, 266 U.S. 32, 33-34 (1924). This Court is not bound by a State Court's conclusion that a constitutional issue has been waived because not presented in a manner below in accordance with the self-proclaimed rules of that State Court, and this determination is itself a question of Federal law which the Supreme Court "must ultimately decide." Liner v. Jafco, Inc., 375 U.S. 301 (1964), cited in Henry v. Mississippi, op cit.

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2 The Georgia parties-to-a-crime statute apparently has never been reviewed by this Court. Appellant urges that it is ripe for review because of misapplication and abuse as set forth hereinbelow.

Appellant was not charged as a party to a crime in the Indictment against him. He was charged with one offense and one offense only: possession with intent to distribute cocaine. The State's theory that Appellant could be convicted, for direct commission of the offense or as a party thereto, or both (see, note 1, supra), was not made until the close of the trial when the Judge gave such charges to the jury. Appellant objected, as did counsel for co-Defendant Ellis, to the jury being charged on the law of parties-to-a-crime, as he also objected to numerous other charges which the Court gave to the jury or which the Court failed to give the jury after Appellant's request. On Motion for New Trial, Appellant argued the unconstitutionality of the Georgia parties-to-a-crime statute, and strenuously made the same argument in his appeal. Quite simply, Appellant did everything he could at the appropriate times, to challenge the propriety and appropriateness of the very proceedings or trial errors which then later formed the basis for the State seeking a charge on parties-to-a-crime.

The machinations of the Georgia Courts to avoid challenges raised by Appellant in the State Courts to the constitutional validity of Georgia statutes are well established before this Court. Wright v. Georgia, 373

U.S. 284 (1963). See also, Whitus v. Georgia, 385 U.S. 545, 645 (1967); and Whitus v. Balkom, 333 F.2d 496, 498, 505, 509-510 (5th Cir. 1964) (on the issue of "fictitious waiver"). As found by this Court in Wright v. Georgia, 373 U.S. 284, 290 (1963), the Supreme Court of Georgia at that time apparently was basing its refusal to consider a constitutional challenge on what was then Section 6-1308 of the Georgia Code Annotated, since repealed. However, this Court found, at 373 U.S. 291, that contrary to the efforts of the Georgia Supreme Court to avoid hearing the constitutional challenge urged upon it by the appellant in that case:

> "Petitioners [obviously] did in fact argue the point which they press in this Court. . . .In short the Georgia court would require the petitioners to say something like the following. . .'A fortiori it was error for the trial court to overrule the motions for a new trial.' As was said in a similar case coming to us from the Georgia courts, this 'would be to force resort to an arid ritual of meaningless form. Staub v. City of Baxley, supra, 355 U.S. at 320. . . .'A local procedural rule. . .cannot avail the State here, because petitioner[s] could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court.' . . .We proceed to a consideration of the merits of petitioners' constitutional claim."

Similarly, in Douglas v. Alabama, 380 U.S. 415 (1965), this Court again rejected a State claim that the constitutional validity of a State statute had not proper-

ly been drawn into question, and was therefore not to be considered by the State Courts, simply because trial counsel had failed to object in the specific and precise language or manner which the Court thereafter required. Id. 380 U.S. 415, 420-422.

Throughout the trial, Appellant's trial counsel objected to the taint and spill-over of evidence against Appellant by virtue of the Court's failure to sever the co-Defendant pleading entrapment and as to allowing evidence of a conspiratorial nature to be presented against Appellant when neither he nor the jury was charged on the law of conspiracy. These objections went to the only substantive issues that were before the Court at those times. Further, Appellant moved for a directed verdict of acquittal at the close of evidence, which was denied. This, too, went to the ultimate issues later presented to the jury on parties-to-a-crime. However, at the time such objections were made, the issue of charging on parties-to-a-crime had not been joined, nor was that statutory offense charged to this Appellant.

To require the Appellant to have raised objections perfect in form before he did, and to deny him the opportunity to challenge the constitutional validity of the statute at issue, is to place form over substance.

A State Court cannot do this, and its efforts to do so are reviewable and must be reviewed by this Court. Douglas v. Alabama, 380 U.S. 415 (1965); Henry v. Mississippi, 379 U.S. 443 (1965); and Wright v. Georgia, 373 U.S. 284 (1963).

In Douglas v. Alabama, 380 U.S. 415, 422 (1965), this Court allowed that if the State of Alabama could have shown a "legitimate State interest" served by its reliance on procedural rules to deny a constitutional attack on a State statute, it might be sufficient to withstand review by the Supreme Court of the United States. Id. However, in that case, as in the case sub judice, the State Court has neither shown a specific and enunciated procedural rule upon which an Appellant might be on notice as to the specific format of raising a constitutional claim in order to preserve it, nor has the State shown any legitimate interest in denying constitutional review. There is no rule of the Georgia Court of Appeals or of the Georgia Supreme Court which puts this Appellant on notice as to the conclusion enunciated in the Court of Appeals Opinion at Division 13 (Appendix "A"), and the case cited in that Division 13, Corley v. State, op cit., and other cases cited hereinabove, are bald conclusions only and do not set forth any State interest for their application to this Appel-

lant.

Regardless of the attempt by the Georgia Court of Appeals to evade the constitutional attack on the parties-to-a-crime statute, the Court in that very same Division 13 of its Opinion (Appendix "A"), states that the parties-to-a-crime statutes, Sections 26-801 and 26-802, are "not unconstitutionally vague, indefinite and overbroad," citing Wanzer v. State, 232 Ga. 523(6), 207 S.E.2d 466 (1974), wherein the Georgia Supreme Court concluded, simply and without elaboration, that "there is no merit in the contention that [Code Ann. § 26-801] is unconstitutionally vague, indefinite and overbroad." Id., 232 Ga. 529. Thus, although its reasons are not entirely clear, the Court of Appeals of Georgia, as affirmed in the case sub judice by the Supreme Court of Georgia, has in fact upheld the constitutionality of the Georgia parties-to-a-crime statute, in the face of Appellant's constitutional attack thereon.

B. The Georgia parties-to-a-crime statute is unconstitutionally vague, indefinite and overbroad.

The Georgia parties-to-a-crime statute, being comprised of Sections 26-801 (setting forth who may be a party to a crime) and 26-802 (providing that one who is a party to a crime may be convicted and sentenced as a

person who directly commits a crime), Georgia Code Annotated (now O.C.G.A. §§ 16-2-20 and 16-2-21), is vague and overbroad. A person whom the State wishes to charge and convict thereunder, cannot be on notice as to the nature of the charges against him or as to the punishment to which he is being submitted. The party so charged cannot have effective assistance of counsel because the charges are so vague, and he is not able to defend himself against evidence brought against him as a party to a crime. Finally, the purported party to a crime is being denied equal protection of the laws in that he is not afforded the ability to defend himself as is one who is charged only with directly committing a crime. Amendments V, VI and XIV, Constitution of the United States.

The parties-to-a-crime statute in Georgia is of recent vintage, having been passed by the State Legislature in 1968, as part of a package repealing those provisions of Georgia law which related to principals and accessories to a crime, formerly Ga. Code Ann. Chapters 26-5 and 26-6. See, Committee Notes to Chapter 26-8, Georgia Code Annotated, 1968. However, when the language of the present parties-to-a-crime statute is read alongside the previous Georgia Code sections on accessories and principals, the new Code

Section is much broader; thus, rather than simply restating and recodifying the previous Code Sections, the new Code Section, contrary to the legislative intent, becomes overbroad, vague and ambiguous. The repealed Georgia Code Sections on principals (Ga. Code Ann. §§ 26-501 and 502) and accessories (Ga. Code Ann. §§ 26-601, 602 and 604), are reprinted at Appendix "D." For example, the new parties-to-a-crime statute, going beyond the previous aforecited Code Sections, makes one a party to a crime because he is "concerned in the commission of a crime," if he, among other things, "advises or encourages another person to commit the crime directly." Section 26-801(b)(4), Georgia Code Annotated (now O.C.G.A. § 16-2-20(b)(4)). The language of the predecessor principals and accessories statutes, however, is much more specific in defining and putting a Defendant on notice as to when he might be charged and convicted for commission of a crime.

This statute encompasses by its terms a class of persons larger than intended by the legislature; it is virtually impossible to determine the class of persons who comprise "parties-to-a-crime." When such a statute is given as a charge to a jury, especially where, as in this case, the evidence against a co-Defendant is over-

whelming relative to this Appellant, Appellant shows there is no way such a charge could be other than confusing and would tend to lead the jury to the conclusion that anyone -- including this Appellant -- is a party to a crime simply because they had "something," however, minimal, to do with events surrounding a crime. This is the danger of overbreadth and vagueness in this statute; it confuses the jury and necessarily works harmful prejudice on the Appellant.

C. Where there is an ambiguity in a criminal statute, it must be construed in favor of the accused. Failure to do so violates due process and equal protection.

As stated hereinabove, the Georgia parties-to-a-crime statute is vague and ambiguous and therefore must be construed in light of any ambiguity in favor of the accused and strictly against the State. This basic precept of constitutional law is recognized even by the Courts in the State of Georgia. Matthews v. Everett, 201 Ga. 730, 41 S.E.2d 148 (1947); see also, Paras v. State, 247 Ga. 76, 279 S.E.2d 451 (1981). A statute is invalid for uncertaintly when it requires or forbids the doing of an act in such terms that reasonable men must guess at its scope or meaning or must guess at the meaning of the statute and differ as to its application. Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962).

The words and phrases used in a statute must be given the meaning intended by lawmakers. Brotherhood of Locomotive Firemen & Enginemen v. Northern Pac. Ry., 274 F.2d 641 (8th Cir. 1960). Therefore, in the case sub judice, where the parties-to-a-crime statute was intended only to recodify the existing principals and accessories statutes, it cannot and should not be interpreted to go beyond that. In this case, and as in other cases cited hereinbelow, however, the Courts of Georgia are construing the parties-to-a-crime statute beyond its clearly intended meaning. Penal statutes cannot be enlarged by implication or intendment beyond the language used or the legislative intent. See, generally, Ladner v. United States, 358 U.S. 169 (1958); Shaver v. United States, 174 F.2d 618 (9th Cir. 1949); United States v. Walter, 484 F.Supp. 183 (S.D. Ga. 1980); and Wood v. State, 219 Ga. 509, 134 S.E.2d 8 (1963).

Penal statutes cannot be held to include offenses or persons other than those which are clearly described and provided for, even though a Court may think the legislature should have made the statutes more comprehensive. United States v. Weitzel, 246 U.S. 533 (1917); Ventimigilia v. United States, 242 F.2d 620 (9th Cir. 1957); and also, generally, 82 C.J.S. Statutes

§ 389, p. 928. Whenever a criminal statutes admits of two constructions, that which is more favorable to the accused is to be preferred. Ornelas v. United States, 236 F.2d 392 (9th Cir. 1956).

It is not up to the Courts of any State, including Georgia, to broaden legislative intent. These Courts are charged with applying penal statutes as clearly as possible, and where there is any doubt as to whether or not a defendant falls within the proscribed class of activity or persons, the statute must be applied strictly against the State and in favor of the defendant. Hollowell v. Jove, 247 Ga. 678, 279 S.E.2d 430 (1981); Sale v. Leachman, 218 Ga. 834, 131 S.E.2d 185 (1963); Rayle Electric Membership Corp. v. Cook, 195 Ga. 734, 25 S.E.2d 574 (1943); Cook v. State, 141 Ga.App. 241, 233 S.E.2d 60 (1977); and Benefield v. Malone, 110 Ga.App. 607, 139 S.E.2d 500 (1964).

D. The Georgia Appellate Courts are subjecting this Appellant to an improper application of the Georgia parties-to-a-crime statute because they are using it as a general conspiracy statute, contrary to legislative intent and in violation of Appellant's Federal Constitutional rights.

The Georgia parties-to-a-crime statute was enacted to recodify pre-existing law on principals and accessories. It was not then nor can it be now intended as

a conspiracy statute. See, Committee Notes, Chapter 26-8, Georgia Code Annotated, 1968. The legislative committee considering the parties-to-a-crime statute specifically stated that, as to the previous law on principals and accessories, the new law "is not a change from former Georgia law." Id. at introduction.

Nowhere in the legislative history is there any indication that the parties-to-a-crime statute was intended to comprise or serve as a conspiracy statute. In fact, one year later, in 1969, the Georgia legislature specifically passed a general conspiracy statute, reinforcing the fact that the parties-to-a-crime is intended to reach persons other than those involved in a conspiracy. The general conspiracy statute is found at Ga. Code Ann. § 26-3201 (now O.C.G.A. § 16-4-8), attached hereto as Appendix "C." (There is also a specific conspiracy statute within the Georgia Controlled Substances Act, being Section 79A-812, Georgia Code Annotated, now O.C.G.A. § 16-13-33. The difference between the drug offense conspiracy and the general conspiracy statute is one of penalty, and this is not at issue here.)

The Georgia Courts have repeatedly blurred the distinction between the conspiracy and parties-to-a-crime statutes. The Georgia Court of Appeals is using

the parties-to-a-crime statute as if it were, and for the same purposes as, the conspiracy statute. For example, in Division 6 of its Opinion hereinbelow (Appendix "A"), the Georgia Court of Appeals, in quoting one of its earlier opinions, states that "while Ga. Code Ann. Section 26-801 does not use the word 'conspiracy' it is plain that it embodies the theory of conspiracy." Rickman v. State, 164 Ga.App. 366, 369, 296 S.E.2d 726 (1982), citing Hamby v. State, 158 Ga.App. 265(2), 279 S.E.2d 715 (1981). See also, the reliance by the Supreme Court of Georgia on Scott v. State, 229 Ga. 541, 192 S.E.2d 367 (1972).

Hughes v. State, 150 Ga.App. 90, 91, 256 S.E.2d 639 (1979), further blurs the distinction between parties-to-a-crime and conspiracy, by specifically finding that a "person concerned" in the commission of the crime under Section 26-801, is chargeable as and like a conspirator. Likewise, the District Attorney, in his Brief to the Georgia Court of Appeals, quite blatantly talks in terms of Appellant being part of a conspiracy, citing Crosby v. State, 232 Ga. 599, 601, 207 S.E.2d 515 (1974).

The State has completely misconstrued the parties-to-a-crime statute as being applicable to a conspiracy situation or being used in lieu of a conspiracy statute,

when in fact the clear legislative intent is contra.

Appellant was not indicted for conspiracy. Although the law in Georgia is that a defendant may be convicted of conspiracy, based on evidence introduced at trial and notwithstanding the fact that he was not indicted for conspiracy, to do so the elements of conspiracy still must be proved. This includes evidence that there was a plan among the co-conspirators, Curtis v. State, 150 Ga.App. 507, 508, 258 S.E.2d 247 (1979); that there must be some element of affirmative cooperation or at least an agreement to cooperate, Stinson v. State, 151 Ga.App. 533, 539, 260 S.E.2d 407 (1979), citing United States v. Collins, 552 F.2d 243, 245(1-3) (8th Cir. 1977); that there must be more than spatial proximity between an alleged co-conspirator and contraband, Stinson v. State, Id. at 151 Ga.App. 540, citing Donaldson v. State, 134 Ga.App. 755, 756, 216 S.E.2d 645 (1975); that the conspiracy evidence must not only be consistent with the hypothesis of guilt "but shall exclude every other reasonable hypothesis save that of the guilt of the accused," Sentell v. State, 227 Ga. 153, 156, 179 S.E.2d 234 (1971); and that there must be a "corrupt agreement between two or more persons to do an unlawful act," Caldwell v. State, 227 Ga. 703, 706, 182 S.E.2d 789 (1971), citing Fincher v. State,

211 Ga. 89(4), 84 S.E.2d 76 (1954). In the case sub judice, the elements of conspiracy were not proved, and therefore a charge on conspiracy was neither warranted nor given.

Additionally, however, no charge of conspiracy could be given to the jury because, in Georgia -- an exception to the "no-merger rule" -- once there is firm evidence that the substantive crime has been committed, there can be no separate conviction for conspiracy. Evans v. State, 161 Ga.App. 468, 471, 288 S.E.2d 726 (1982). Since in the case sub judice Appellant was charged with possession with intent to distribute cocaine, and the fact of a large amount of cocaine having been present in a motel room adjacent to the one in which Appellant was arrested having been proved, there could be no conspiracy charged to the jury nor could Appellant be convicted of conspiracy.

The great harm done to this Appellant, and to numerous others, is that the Courts of Georgia, and specifically the Georgia Court of Appeals and the Supreme Court in the case sub judice, utilize the parties-to-a-crime statute as if it were a conspiracy statute, to circumvent the clear rule in Georgia that there is a merger of conspiracy and the substantive offense. This is a clear and blatant unconstitutional

application of the parties-to-a-crime statute, and is ripe for review by this Court. For oft-cited cases in which the Georgia Courts have so misconstrued the conspiracy and parties-to-a-crime statutes, see, Scott v. State, 229 Ga. 541, 544, 192 S.E.2d 367 (1972); and Hamby v. State, 158 Ga.App. at 265, 279 S.E.2d 715 (1981), wherein the Court of Appeals expressly equates conspiracy and parties-to-a-crime, holding "the evidence amply authorized a charge on conspiracy under Code Ann. § 26-801," (emphasis added), quoting Harvey v. State, 233 Ga. 41, 44(5), 209 S.E.2d 587 (1974).

The Georgia Courts have attempted to explain their way out of an improper application of the parties-to-a-crime statute to embrace a conspiracy theory, on the grounds that conspiracy is a lesser included offense of parties-to-a-crime. Gunter v. State, 243 Ga. 651, 660, 256 S.E.2d 341 (1979) and Dutton v. State, 228 Ga. 850, 853, 188 S.E.2d 794 (1972). Due process requires that one accused of a crime be fully apprised of the charges against him, and that while an accused may be convicted of a lesser or included crime of the crime charged in an indictment, he may not be convicted of a distinct offense. Salinas v. United States, 277 F.2d 914 (9th Cir. 1960); see also, generally, 42 C.J.S. Indictments § 295, p. 1324. Conspiracy in Georgia is a

separate and distinct offense, and although, as cited hereinabove, it need not be charged in an indictment for a conviction thereon to hold, the elements must be proved. These elements include those listed hereinabove, and if they are not so proved, as in the case sub judice, then a conviction on conspiracy cannot hold. Any effort to charge conspiracy cloaked in the disguise of parties-to-a-crime, in order to broaden the evidence brought to bear against a defendant, or to confuse a jury, fails utterly to inform either the defendant or the jury of definitive charges. See, e.g., Brooks v. State, 141 Ga.App. 725, 729-730, 234 S.E.2d 541 (1977).

Where a conspiracy cannot hold and cannot be charged if the elements are not proved, or where a conspiracy theory does not lie as a matter of law, for a Court to charge parties-to-a-crime as if it were a conspiracy statute for the express purpose of incorporating a conspiracy theory, clearly and grossly violates due process and equal protection of the laws. The State of Georgia cannot do indirectly what the law and the Constitution expressly prohibit it from doing directly. It has done so in the case at bar, continues to do so with regard to other similar cases, and these gross violations of this Appellant's constitutional rights

to due process and equal protection of the laws cannot go unremedied, but are, rather, ripe for review by this Court.

E. The Georgia Court of Appeals and Supreme Court are applying the parties-to-a-crime statute against this Appellant in an unconstitutional manner, by way of utilizing said statute as a reason to deny Appellant a severed trial.

Appellant filed a pre-trial Motion for Severance, and repeatedly made timely requests to sever and objections to evidence introduced which he argued would not be admissible against him on a severed trial. Appellant argued these matters in opposition to charges given the jury and in his Motion for New Trial and on appeal below.

Appellant was not only denied a Motion to Sever, but was denied the charges he and counsel for co-Defendant requested to cure the possibility that the jury would improperly consider the strong evidence against the co-Defendant pleading entrapment against this Appellant. Appellant argued the "taint" of such evidence and the "spill-over effect" on him were highly prejudicial and constituted grounds for a reversal. However, the Court of Appeals, in Divisions 6 and 8 of its Opinion (Appendix "A"), relied on the aforecited parties-to-a-crime statute as reason for denying Appel-

lant a severance. The Court of Appeals concluded, as argued by the District Attorney in his appellate Brief, that since the evidence Appellant sought to have excluded by virtue of not having been granted a severance could have been introduced against him anyway because he was a "party to the crime," Appellant's request for a severance was moot.

Thus, whenever the Georgia Court of Appeals in the case sub judice (or in similar cases cited hereinabove), arrives at a roadblock raised by Appellant, it is met head-on by ritualistic recital of the parties-to-a-crime statute. Whenever the Court of Appeals arrives at a fork in the road, requiring a decision to review an issue raised by Appellant or to grant him constitutionally-based relief, the Court relies on the talismanic, black-letter parties-to-a-crime statute as the judicial roadmap requiring taking a course other than that sought by the Appellant. The parties-to-a-crime statute is not and cannot be used as a conspiracy statute; and it does not afford proper grounds for denial of a motion to sever wherein Appellants have raised substantial questions of prejudicial taint and spill-over. By using parties-to-a-crime as a conspiracy statute, while not alleging or proving a conspiracy, the Georgia Courts fail to put Appellant on sufficient notice of the evidence to be

used against him, since the parties-to-a-crime statute is much broader than the language of the substantive crime charged and it is not a lesser included offense. This violates elementary precepts of due process, effective assistance of counsel and equal protection of the laws. Amendments V, VI and XIV, Constitution of the United States.

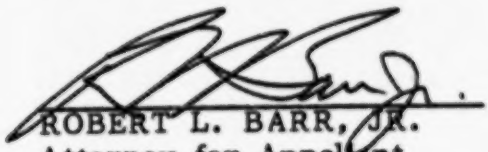
CONCLUSION

It is submitted that the Supreme Court of Georgia erred in upholding the constitutionality of the Georgia parties-to-a-crime statute, which is unconstitutional on its face. It is further submitted that the Georgia Supreme Court erred in affirming Appellant's conviction, and in sustaining the Court of Appeals' affirmation thereof, based on an unconstitutional application of the Georgia parties-to-a-crime statute, using it for purposes clearly not intended by the legislature, and to circumvent Georgia law and the Constitution of the United States and in violation of Appellant's rights as secured by the Fifth, Sixth and Fourteenth Amendments.

The Appellant would further submit that the questions presented by this appeal are not only substantial, but are of great public importance warranting plenary

consideration by this Court to correct gross Constitutional errors and clear up substantial confusion in the interpretation by the Georgia Courts of Georgia's penal statutes.

Respectfully submitted,



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3

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served three (3) true and correct copies of the foregoing Jurisdictional Statement by United States Mail, postage prepaid, upon:

James T. Martin, Esq.
Assistant District Attorney
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Marietta, Georgia 30061

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This 22nd day of April, 1983.

ROBERT L. BARR, JR.
Attorney for Appellant

APPENDIX "A"

October 18, 1982

No. 63999

SAMUEL THOMAS RICKMAN, Appellant,
v.
STATE OF GEORGIA, Appellee

Rehearing Denied November 12, 1982
Application for Certiorari Denied January 5, 1983
Application for Rehearing Denied January 25, 1983

SHULMAN, Presiding Judge

Appellants were tried together and convicted of possession of cocaine. Each now appeals from the judgment entered on the jury's verdict.

The following facts could be adduced from the evidence presented at trial. Using an informant as an intermediary, an undercover police officer made arrangements to purchase a kilogram (2.2 lb.) of cocaine from appellant Hoskens. After meeting Hoskens at a Delk Road motel, the undercover officer and Hoskens proceeded to the Best Western Motel on Interstate 20 to rendezvous with people arriving from Alabama for the deal. The officer and Hoskens' female companion rented adjoining rooms at the motel (Rooms 105 and 107). Surveillance teams stationed near the Best Western observed appellants Rickman and Ellis arrive in a car with Alabama tags and park next to Hoskens' automobile. The latest arriving appellants went into the

motel, returned to the car, retrieved from it a brown briefcase, and reentered the motel.

Meanwhile, the undercover officer, having seen one pound of cocaine, having been told the remainder of the kilogram was "next door," and having been satisfied with the cocaine sample provided to him by Hoskens, left Room 107 of the motel and went to his parked automobile to obtain the money for the drug purchase. This conduct was the prearranged signal for the surveillance teams to assemble for the imminent arrests. The police officers gained access to Room 107 through the use of the undercover officer's room key, arrested Hoskens and confiscated a pound of cocaine. Upon knocking and announcing their identity as police officers at Room 105, they were met with the sounds of running water and a repeatedly flushed toilet. Using the manager's pass key, the officers entered that room to find Ellis standing by the door and Rickman in the bathroom with an empty plastic bag. Scrapings from the toilet bowl and the residue from the plastic bag were identified as cocaine. A search of Room 105 uncovered a glass vial containing what was later identified as cocaine from between the bed's mattress and box springs, and a plastic bag containing a white powdery substance later identified as cocaine from a shaving bag.

1. Appellant Hoskens, who pled a defense of entrapment at trial, now asserts that the verdict is contrary to the law. "Entrapment exists where the idea and intention of the commission of the crime originated with a government officer or employee, or with an agent of either, and he, by undue persuasion, incitement, or deceitful means, induced the accused to commit the act which the accused would not have committed except for the conduct of such officer." Code Ann § 26-905. Hoskens maintains that the state failed to prove he was predisposed to commit the crime. However, Hoskens himself testified that a police informant's alleged offer of $1,500 caused him to become involved in the purported sale of cocaine. "[T]he mere fact that the defendant was persuaded (if he was) by a friend to engage in practices he knew to be criminal simply to 'make a lot of money' does not constitute entrapment; if it did, practically every offender could find and rely on such incidents in his own past." Leonardi v. State, 154 Ga. App. 402, 405 (268 SE2d 380). Hoskens' assertion of the general grounds is without merit.

2. Appellants Rickman and Ellis appeal from the denial of their motion to suppress evidence discovered pursuant to warrantless searches of Rooms 105 and 107 following their warrantless arrests.

An officer may make a warrantless arrest "if the offense is committed in his presence, or the offender is endeavoring to escape. . .or for other cause there is likely to be failure of justice for want of an officer to issue a warrant." Code Ann. § 27-207(a). A warrantless arrest is not violative of this statute if the officer had probable cause to make an arrest, i.e., if he knew facts and circumstances, based on reasonably trustworthy information, sufficient to warrant a prudent man to believe that the defendant had committed an offense. Watson v. State, 153 Ga. App. 545 (1) (265 SE2d 871). The knowledge that a pound of cocaine was in the room "next door" to Room 107; the failure of anyone to respond to police requests to enter Room 105; the continuous sounds of running water and a flushing toilet; and Rickman's fully-clothed presence in a running bathtub with an empty plastic bag was ample cause to arrest appellants. It was not error to refuse to suppress the plastic bag and its residue (later identified as cocaine) found with Rickman or the samples of white powder an officer viewed on the rim of the toilet bowl. Both were dicovered in the plan view of officers who had a legal right to be where they were at the time they saw the evidence. Brewer v. State, 129 Ga. App. 118, 119 (199 SE2d 109).

3. Appellants Rickman and Ellis also protest the admission into evidence of a glass vial containing cocaine. The vial was discovered between the mattress and box springs of one of the beds in Room 105 by police officers conducting a search of the room subsequent to appellants' arrests. Whether or not this evidence was illegally seized is immaterial in light of the fact that the amount of legally seized contraband sufficiently supports the jury's verdict. See generally Lentile v. State, 136 Ga. App. 611 (1) (222 SE2d 86) where this court affirmed a conviction for possession of marijuana after suppressing some of the evidence pertaining to that charge.

4. The remaining contraband introduced at trial was discovered in Room 107 or in a blue shaving bag found in Room 105. At trial, Hoskens identified the bag as his. Since neither appellant Rickman nor appellant Ellis established that he had "a legitimate expectation of privacy" in Room 107 (rented by the undercover officer) or in Hoskens' blue shaving bag which he had left in Room 105, neither showed that his Fourth Amendment rights were violated with regard to the items seized from Room 107 and the shaving bag. Having failed to establish a violation of their Fourth Amendment rights, appellants do not have standing to

challenge the constitutionality of these searches. United States v. Salvucci, 448 U.S. 83 (100 SC 2547, 65 LE2d 619).

5. Rickman and Ellis argue that warrants could have been procured by the police prior to the arrests and search. This contention is without merit. In Lentile v. State, supra, p. 613, "the rendezvous point was not agreed upon until approximately an hour and a half beforehand, and it does not appear that the agents knew in advance that the defendant planned to proceed from the rendezvous point to his residence." That situation is analogous to the present one in that the police officers did not know beforehand that the deal would be moved to a different motel. It was not until Hoskens and the undercover officer met at the location originally agreed upon that it was decided that the sale would take place at another site. The drug purchase occurred approximately an hour and a half after the undercover officer's arrival at the second motel. As in Lentile, the time span was not so long as to require the procurement of a warrant.

6. Each appellant enumerates the denial of his motion for severance an error. Such a motion is committed to the sound discretion of the trial judge, whose ruling is subject to reversal only for an abuse of dis-

cretion. Montgomery v. State, 156 Ga. App. 448, 452 (274 SE2d 804). "Some of the considerations for the court in exercising its discretion have emerged from the cases considering motions to sever: 1. Will the number of defendants create confusion of the evidence and law applicable to each individual defendant? 2. Is there a danger that evidence admissible against one defendant will be considered against another despite the admonitory precaution of the court? 3. Are the defenses of the defendants antagonistic to each other or to each other's rights? [Cit.] If the defendant can show the court by some facts that failure to sever will prejudice him under one or more of these considerations, his motion should probably be granted." Cain v. State, 235 Ga. 128, 129 (218 SE2d 856). Furthermore, "the trial court's denial of the motion to sever will not be disturbed unless the defendant can make a clear showing of prejudice. [Cits.]" Depree v. State, 246 Ga. 240, 241 (217 SE2d 155).

Each appellant maintains that Hoskens' assertion of the defense of entrapment was antagonistic to the pleas of not guilty propounded by Ellis and Rickman. "The mere fact that co-defendants' defenses are antagonistic is not sufficient in itself to warrant separate trials. [Cit.] A showing of harm is necessary. [Cit.]" Cain

v. State, supra, p. 129. Each appellant complains that he was harmed by the evidence admitted against his co-defendants. We disagree.

Because Hoskens' entrapment defense required him to admit the commission of the offense with which he was charged, we are unable to find that Hoskens was prejudiced by the evidence adduced against his co-defendants. McDonald v. State, 156 Ga. App. 143 (5) (273 SE2d 881). Insofar as Rickman and Ellis are concerned, the evidence, as previously summarized, was sufficient for a rational trier of fact to determine beyond a reasonable doubt that Rickman and Ellis were parties to the crime. See Code Ann. § 26-801. "While Code Ann § 26-801 does not use the word 'conspiracy' it is plain that it embodies the theory of conspiracy" (Hamby v. State, 158 Ga. App. 265 (2) (279 SE2d 715)) and, under such a theory, "each of the acts and statements of each of the participants in the criminal enterprise was the same as if [Ellis and Rickman] had done the act or made the statement himself. Thus, whether such evidence was admitted at a severed trial or at a joint trial, the effect and impact legally is the same." Montgomery v. State, supra, p. 451. Consequently, none of the appellants has demonstrated harm or prejudice accruing from the denial of his motion to sever.

Accordingly, the denial of the motions to sever was not error.

7. In a related enumeration, appellant Ellis asserts as error the trial court's denial of his motion to be excused from the courtroom. Ellis made the motion after he had rested his case without presenting any evidence in his defense and prior to the presentation of a defense by appellant Hoskens.

In Georgia, a criminal defendant has a constitutional right to be present at all stages of his trial. Code Ann. § 2-111; Wilson v. State, 212 Ga. 73 (1) (90 SE2d 557); Durrett v. State, 135 Ga. App. 749 (2) (219 SE2d 9). Such a right can be waived by the defendant. See Wilson, supra. However, the exercise of a waiver of a constitutional right is not an absolute right, and the trial court must exercise its discretion when presented with a defendant's request to waive a constitutional right. It cannot be said that the trial court erred when it made a ruling which ensured the enforcement of the defendant's constitutional right.

8. Both Rickman and Ellis complain that the trial court's refusal to give requested instructions after the denial of their renewed motions to sever was error. Appellants sought to have the jury informed that they were not to consider against Ellis and Rickman any

evidence introduced after those defendants had rested. Such a charge would have been inappropriate in light of the state's use of Code Ann. § 26-801 concerning parties to a crime. Furthermore, it was not error to refuse to give the requested instruction since the trial court could have exercised its discretion and allowed the state to reopen its case and present additional evidence. See King v. State, 230 Ga. 581 (3) (198 SE2d 305); Burden v. State, 182 Ga. 533 (3) (186 SE 555).

9. Appellants Ellis and Rickman contend that error resulted from the trial court's refusal to grant their motions for a mistrial after the jury had allegedly discussed evidence before the case had been submitted to it. Appellants' enumeration is based upon a handwritten note submitted by a juror to the trial judge on the third day of the six-day trial. The note, written on a paper towel, read: "Please clarify: 1. What is an "agent?" 2. Are all agents police officers? The attorneys have been using the terms agent and officer interchangeably." Appellants maintain that this note is evidence that the jury improperly discussed the case prior to the close of the evidence. However, the contents of the note in no way indicate that an improper discussion had taken place, that any of the jurors had

already formed an opinion on the case, or that a fair and impartial trial could not be had with this jury. "The question of whether or not to grant a mistrial lies within the sound discretion of the trial court. That decision will not be reversed on appeal absent an abuse of discretion." Roberts v. State, 242 Ga. 634, 636 (250 SE2d 482). No irregularity having been established and no harm having been sustained by appellants, the trial court did not abuse its broad discretion in deying the motions for mistrial. See Smith v. State, 218 Ga. 216 (2c3) (126 SE2d 789); Smith v. Blackshear, 127 Ga. App. 610 (194 SE2d 519).

10. Appellant Hoskens claims error in the trial court's refusal to poll the jury to determine whether its memebers had engaged in an improper discussion of the case. Inasmuch as no irregularity in the conduct of a juror was shown to have occurred, it was not necessary to poll the jury. Since the actions of the trial court were not abusive of its authority, appellant's contention is meritless.

11. Appellants Rickman and Ellis also appeal the denial of their motions for directed verdicts of acquittal. Each appellant maintains that because the sole connection between him and the contraband was "spatial proximity," each appellant was entitled to a directed

verdict of acquittal. See, e.g., McCann v. State, 137 Ga. App. 445 (224 SE2d 99).

"The trial court's refusal to direct a verdict of acquittal is error only where there is no conflict in the evidence and a verdict of acquittal is demanded as a matter of law. [Cits.] In reviewing the denial of a motion for directed verdict. . .the proper standard to be utilized by the appellate court is the 'any evidence' test. [Cits.] Sims v. State, 242 Ga. 256, 257 (248 SE2d 651).

Our review of the trial transcript leads us to conclude that there was evidence to support the trial court's denial of the motions for directed verdict. There was testimony that the undercover police officer had been informed by Hoskens that the cocaine would be brought to the Best Western by people from Alabama; Ellis and Rickman arrived in Ellis' car (which displayed an Alabama tag), parked next to Hoskens' station wagon and proceeded to the room which Hoskens' companion had rented. They returned to the car, retrieved from it a brown briefcase which was capable of containing a kilogram of cocaine, and re-entered the motel. When the police announced their identify and requested admission into the Ellis/Rickman room, the officers were greeted with the sound of a

4

toilet being flushed repeatedly. After gaining entry to the room and overcoming Ellis' resistance, the officers apprehended appellant Rickman in the bathroom where he was holding a plastic bag which contained cocained residue. A scraping from the commode also revealed the presence of cocaine. Inasmuch as there was testimony that appellants Rickman and Ellis were linked to the possession of the cocaine by more than "spital proximity," the trial court did not err when it denied the motions for directed verdicts of acquittal.

12. Citing Cunningham v. State, 248 Ga. 835 (4) (286 SE2d 427), Rickman contends that the admission into evidence of the brown briefcase constituted reversible error. In Cunningham, the Supreme Court reversed the appellant's murder conviction on the ground that the two pieces of physical evidence, unconnected to the crime, were admitted into evidence and considered by the trier of fact. That holding is not applicable to the case at bar since the briefcase here was connected to the appellants: it was found in their room, appellants had been observed carrying it from Ellis' car to the motel, and it was posited that the cocaine had been transported within it. It was not error to admit it into evidence.

13. Rickman next complains that the trial court erred in charging the jury on the concept of parties to a crime because the statute (Code Ann. § 26-801) upon which the instruction was based is allegedly unconstitutional. Because appellant made no constitutional objection to either the charge or the statute at trial, we will not address his enumeration other than to note that the Supreme Court held that Code Ann. §§ 26-801 and 802 were not unconstitutionally vague, indefinite and overbroad in Wanzer v. State, 232 Ga. 523 (6) (207 SE2d 466). Corley v. State, 154 Ga. App. 301 (2) (268 SE2d 508). Inasmuch as the evidence authorized a charge on parties to a crime, there was no error in so instructing the jury.

14. Appellants Hoskens and Rickman contend that a tape recording of conversations electronically transmitted by means of a "body bug" worn by the undercover officer was improperly admitted into evidence.

Rickman maintains that the trial court erred when it permitted the state to play portions of the tape recording to the jury after the court had denied appellant's motion to have the tape independently tested. Three conversations transmitted by the "body bug" were played for the jury by the state in rebuttal to

appellant Hoskens' entrapment defense. In a pre-trial motion, appellant Rickman sought to have the tape independently examined to determine whether the tape had been altered and to see if inaudible portions could be made audible.

"A criminal defendant on trial for his liberty is entitled on motion timely made to have an expert of his choosing, bound by appropriate safeguards imposed by the court, examine critical evidence whose nature is subject to varying expert opinion." Sabel v. State, 248 Ga. 10, 17 (282 SE2d 61). Because we have concluded that the tape recording was not "critical evidence," we do not reach the question of whether it is subject to varying expert opinion, and we affirm the trial court's decision to deny appellant's motion for an independent examination of the tape and to allow the jury to hear portions of the tape at trial.

"'Critical evidence,' for the purposes of the due process clause, is evidence, that, when developed by skilled counsel and experts, could induce a reasonable doubt in the minds of enough jurors to avoid a conviction." White v. Maggio, 556 F2d 1352, 1357 (5th Cir. 1977), cited with approval in Sable v. State, supra, p. 18. The tape recording, as used, did not constitute "critical evidence" as that term has been

defined, and therefore the trial court did not err in refusing to allow an independent examination of the tape. It was not error to allow the jury to hear portions of the recording. See Tookes v. State, 159 Ga. App. 423 (3) (283 SE2d 642).

15. Hoskens' first argument against the admission of the tape is the alleged failure of the state to lay a proper foundation for the admission of a tape recording into evidence.

The basic steps for laying the proper foundation before a tape recording is admissible at trial are set forth in Steve M. Solomon, Jr., v. Edgar, 92 Ga. App. 207 (3) (88 SE2d 167), and its progeny. Since police officers testified "that the tape recorded was in condition to take testimony; that the operator of it was competent; that it was authentic and correct; that it had not been changed or altered; that it had been in their custody; and who the speakers were" (Estes v. State, 232 Ga. 703 (4b) (208 SE2d 806)), and "[t]here was absolutely nothing to indicate that [appellants'] statements were not voluntary and of [their] own choosing" (Brooks v. State, 141 Ga. App. 725, 735 (234 SE2d 541)), the proper foundation was laid and it was not error to admit the tape.

16. Lastly, appellant Hoskens argues that the lack of a transcript of the portions of the tape played before the jury resulted in an incomplete record for this court to review.

The record and transcript of the case, which includes the reel of tape as an exhibit thereto, have been examined by this court. Appellant's claim of an incomplete record is without merit. See State v. Knowles, 247 Ga. 218 (274 SE2d 468).

17. Rickman and Ellis each enumerates as error the denial of his motion for new trial. Any ground for reversal presented in those motions not discussed above must be deemed abandoned as unsupported claims of error under Court of Appeals Rule 15 (c) (2). Code Ann. § 24-3615 (c)(2).

Judgment affirmed. Quillian, C.J., and Carley, J., concur.

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta,
November 12, 1982

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

63923. Rodney W. Ellis v. The State
63999. Samuel T. Rickman v. The State

Upon consideration of the motions for a rehearing filed in these cases, it is ordered that they be hereby denied.

COURT OF APPEALS
OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ ALTON HAWK, Clerk.

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 1/5/83

Case No. 39430, Rickman v. The State

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 1/25/83

The motion for a reconsideration was denied today:

Case No. 39430, Rickman v. The State

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

APPENDIX "C"

Georgia Code Annotated

26-801 Parties to crime; punishment

(a) Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.

(b) A person is concerned in the commission of a crime only if he: (1) directly commits the crime; or (2) intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity; or (3) intentionally aids or abets in the commission of the crime; or (4) intentionally advises, encourages, hires, counsels or procures another to commit the crime.

(Now O.C.G.A. § 16-2-20)

Georgia Code Annotated

26-802 Trial and conviction of parties who did not directly commit the crime

Any party to a crime who did not directly commit the crime may be indicted, tried, convicted, and punished for commission of the crime upon proof that the crime was committed and that he was a party thereto, although the person claimed to have directly committed the crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or is not amenable to justice or has been acquitted.

(Now O.C.G.A. § 16-2-21)

Georgia Code Annotated

79A-812 Attempt or conspiracy to commit offense under this article.

Any person who attempts or conspires to commit any offense defined in this article shall be, upon conviction thereof, punished by imprisonment not exceeding the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Now O.C.G.A. § 16-13-33)

Georgia Code Annotated

26-3201 Conspiracy to commit a crime

A person commits a conspiracy to commit a crime when he together with one or more persons conspires to commit any crime and any one or more of such persons does any overt act to effect the object of the conspiracy. A person convicted of criminal conspiracy to commit a felony shall be punished by imprisonment for not less than one year nor more than one-half the maximum period of time for which he could have been sentenced if he had been convicted of the crime conspired to have been committed, by one-half the maximum fine to which he could have been subjected if he had been convicted of such crime, or both. A person convicted of criminal conspiracy to commit a misdemeanor shall be punished as for a misdemeanor. A person convicted of criminal conspiracy to commit a crime punishable by death or by life imprisonment shall be punished by imprisonment for not less than one year nor more than ten years.

(Now O.C.G.A. § 16-4-8)

5

APPENDIX "D"

26-501. (42 P.C.) Principals in first and second degrees. - A person may be principal in an offense in two degrees. A principal in the first degree is the actor or absolute perpetrator of the crime. A principal in the second degree is he who is present, aiding and abetting the act to be done; which presence need not always be an actual, immediate standing by, within sight or hearing of the act; but there may be also a constructive presence, as when one commits a robbery, or murder, or other crime, and another keeps watch or guard at some convenient distance.
(Now repealed.)

26-502. (43 P.C.) Punishment of principal in the second degree. -A principal in the second degree, except where it is otherwise provided, shall receive the same punishment that is provided for the principal in the first degree.
(Now repealed.)

26-601. (44 P.C.) Accessory defined. - An accessory is one who is not the chief actor in the offense, nor present at its performance, but is some way concerned therein, either before or after the act committed.

(Now repealed.)

26-602. (45 P.C.) Accessory before the fact. - An accessory before the fact is one who, though absent when the crime is committed, procures, counsels, or commands another to commit same.

(Now repealed.)

26-604. (47 P.C.) Accessory after the fact. - An accessory after the fact is a person who, after full knowledge that a crime has been committed, conceals it, and harbors, assists, or protects the person charged with or convicted of the crime.

(Now repealed.)

APPENDIX "E"

IN THE SUPREME COURT

OF THE STATE OF GEORGIA

SAMUEL THOMAS RICKMAN, Appellant, v. STATE OF GEORGIA, Appellee.	)	CASE NO. 39430

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that SAMUEL THOMAS RICKMAN, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final Order of the Supreme Court of the State of Georgia denying Appellant's Motion for Reconsideration of his Petitition for a Writ of Certiorari from the Court of Appeals of the State of Georgia, which Court affirmed the judgment of conviction against this Appellant. Said final Order of the Supreme Court of the State of Georgia was entered herein on January 25, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated this 19th day of April, 1983.

Respectfully submitted,

/s/
ROBERT L. BARR, JR.
Attorney for Appellant

120 South Park Square
Marietta, Georgia 30060
(404) 429-1442

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served three (3) true and correct copies of the foregoing Notice of Appeal, by United States Mail, postage prepaid, upon:

James T. Martin, Esq.
Assistant District Attorney
Cobb Judicial Circuit
P. O. Box 649
Marietta, Georgia 30061

Michael J. Bowers, Esq.
Attorney General
State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

I FURTHER CERTIFY that I have this date filed a true and correct copy of the foregoing Notice of Appeal with the Court of Appeals of the State of Georgia in Case No. 63999.

This 19th day of April, 1983.

/s/
ROBERT L. BARR, JR.
Attorney for Appellant

82-1727

NO._____

Office-Supreme Court, U.S.
FILED
MAY 23 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SAMUEL THOMAS RICKMAN,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
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QUESTIONS PRESENTED

1.

Did the Court of Appeals of Georgia decline to consider any constitutional challenge raised based on an adequate and independent state ground, thus precluding the Appellant from asserting an appropriate jurisdictional base in this Court?

2.

Should the instant appeal be dismissed or affirmed because the question upon which the case depends is unsubstantial and does not need further argument?

TABLE OF CONTENTS

Questions Presented. i

A. THE STATUTE. 1

B. THE PROCEEDINGS BELOW. 4

PART TWO - ARGUMENT

A. LACK OF APPELLATE JURISDICTION. 11

B. LACK OF A SUBSTANTIAL FEDERAL QUESTION. 22

PART THREE - CONCLUSION. 27

Certificate of Service. 29

TABLE OF AUTHORITIES

Cardinale v. Louisiana,
394 U.S. 437 (1969). 13, 15

Corley v. State, 154 Ga. App.
301, 268 S.E.2d 76 (1980). . 19

Grayned v. City of Rockford,
408 U.S. 104, 108 (1972). . .24

Hammock v. Zant, 243 Ga. 259,
S.E.2d 727 (1979). 20

Rickman v. State, 164 Ga. App.
366, 296 S.E.2d 726
(1982). 9,10,18

Thrall v. State, 226 Ga. 308,
___S.E.2d___(1970). 19

United States v. Harriss,
347 U.S. 612 (1953). 23

Wanzer v. State, 232 Ga. 523, 207
S.E.2d 466 (1974). 24

Wright v. Georgia,
373 U.S. 284 (1963). 15

STATUTES

O.C.G.A. § 16-2-20;
Ga. Code Ann. § 26-801. . . 2,22

O.C.G.A. § 16-2-21;
Ga. Code Ann. § 26-802. . . 3,22

28 U.S.C. § 1257. 11,21

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

SAMUEL THOMAS RICKMAN,
Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM
THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

PART ONE

THE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTE

In this appeal, the Appellant attempts to bring into question the

validity of the Georgia statute on parties to a crime. Under O.C.G.A. § 16-2-20; Ga. Code Ann. § 26-801, "[e]very person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime." The statute then goes on to define what is meant by "concerned in the commission of a crime." A person is considered to be a party to the crime if he directly commits the crime, intentionally causes some other person to commit the crime under facts that would render the other person not guilty of a crime, intentionally aids or abets in the commission of a crime or intentionally advises, encourages, hires, counsels, or procures another to commit the crime. Id.

Georgia law further provides that once it is determined that a person is a party to a crime, even though he did not directly commit the crime, he may be indicted, tried and convicted for the commission of the crime even though the person who directly committed the crime has not been prosecuted or convicted. O.C.G.A. § 16-2-21; Ga. Code Ann. § 26-802.

Appellant in the instant action has challenged these particular provisions of the Georgia law, asserting that he raised such a challenge in the lower courts. Appellant has also challenged the applicability of these code sections to him under the facts of the instant case.

B. THE PROCEEDINGS BELOW

The Appellant and two co-defendants, Ellis and Hoskins, were jointly tried and convicted of possession of cocaine in the Superior Court of Cobb County, Georgia. The evidence at trial indicated that an undercover police officer made arrangements to purchase a quantity of cocaine from Hoskins. A meeting was held between Hoskins and the undercover officer, after which the two proceeded to a motel in Atlanta to meet with people that were arriving from Alabama to complete the deal.

The undercover officer and a companion of Hoskins rented adjoining rooms at the motel. There were surveillance teams stationed nearby who

observed the Appellant and Ellis arrive in a car with Alabama tags. The two men parked next to Hoskins' automobile. The Appellant and Ellis went into the motel, returned to the car and retrieved a brown briefcase from the car. The two men then returned to the motel.

During this time, the undercover officer had seen a pound of cocaine and had been told the remainder of the kilogram which was to be a part of the deal between Hoskins and the undercover officer was present. The undercover officer went to his car to obtain money for the purchase. This action was a prearranged signal for the surveillance team to assemble.

The officers gained access to one motel room using the undercover police

officer's key and arrested Hoskins and confiscated one pound of cocaine. When they knocked at the room next door and announced their identity as police officers, they heard sounds of running water and a repeatedly flushed toilet. The officers used the manager's pass key and entered the room. They found Ellis standing by the door and found Rickman in the bathroom with an empty plastic bag. Later scrapings from the toilet bowl and the residue of the plastic bag were identified as cocaine. A search of the room also revealed a glass vial between the mattress and box springs of the bed containing cocaine and also a plastic bag in a shaving kit which was also identified as containing cocaine.

Hoskins pled entrapment at trial, whereas the Appellant and Ellis asserted a defense that they had no knowledge that any drug deal was taking place. The trial court denied a motion for severance prior to trial. No challenge was made to the parties to a crime statute at any time during the trial.

Appellant alleges that he raised this issue on the motion for a new trial, but has not cited to the portion of the record where this objection was made. In any event, Appellant raised as an issue on direct appeal a challenge to the parties to a crime statute. Appellant asserted in his brief that the law was unconstitutional on its face and as applied, particularly focusing on the

application of the law to the instant case. No citation was given by the Appellant to any authority supporting his argument that the statute was unconstitutional.

The Court of Appeals of Georgia considered the allegation raised by the Appellant. The Court held,

> Because Appellant made no constitutional objections to either the charge or the statute at trial, we will not address his enumeration other than to note that the Supreme Court held that Code Ann.

§§ 26-801 and
26-802 were not
unconstitutionally
vague, indefinite,
and overbroad in
Wanzer v. State,
232 Ga. 523 (6)
(207 S.E.2d 466).

Rickman v. State, 164 Ga. App. 366, 372, 296 S.E.2d 726 (1982). Therefore, the Court of Appeals of Georgia specifically determimed that the Appellant had not properly raised the objection to the constitutionality of the statute and concluded that it was not properly before the court for review. Appellee submits that tne Court of Appeals of Georgia, therefore, did not rule on this issue. The court subsequently

affirmed the convictions and sentences of all codefendants. Rickman, supra. A motion for rehearing was denied by that court on November 12, 1982.

Appellant subsequently filed a petition for a writ of certiorari in the Supreme Court of Georgia which was denied on January 5, 1983. The motion for reconsideration was denied on January 25, 1983.

Appellant now seeks to assert appellate jurisdiction in this Court raising an issue which the Appellee submits was not addressed by the state courts.

PART TWO

ARGUMENT

A. LACK OF APPELLATE JURISDICTION.

This Court has jurisdiction to review on appeal, as opposed to a petition for a writ of certiorari, decisions of state courts under 28 U.S.C. § 1257. Appellant seeks to assert the jurisdiction of this Court under the provision stating that this Court has jurisdiction "where it is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C. § 1257 (2).

Certain qualifications to this rule have been established by this Court restricting jurisdiction in certain cases. In cases in which the sole federal question presented to this Court has never been raised, preserved or passed on in the state courts, this Court will not exercise jurisdiction. Cardinale v. Louisiana, 394 U.S. 437 (1969). In that case this Court went on to hold as follows:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with

those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground.[sic]

Id. at 439. This Court further pointed out that if there was no state procedure available for considering the issue there would still be the opportunity for federal habeas corpus review and, thus, no need for this Court to exercise its jurisdiction.

Appellant has cited this Court to the decision in Wright v. Georgia, 373 U.S. 284 (1963), in support of his proposition that this Court should exercise jurisdiction. In that decision, a challenge to the constitutionality of the state statute had plainly been raised at trial based on a demurrer to the accusation. Further, the issue was raised on the motion for a new trial and on appeal.

The Supreme Court of Georgia concluded that counsel had not insisted upon the issue on appeal and the court did not address the issue, because it was not explicitly identified in the brief. Under that particular factual situation, this Court concluded that the state ground which served as a basis for the decision was inadequate and that the defendant was not fairly apprised of the existence of the procedural rule. This does not restrict the use of an adequate state ground to preclude consideration of a particular issue.

In the instant case even though Appellant asserts that he challenged the statute in question by means of an objection to the charge of the court at trial, no objection is shown which

indicates that the constitutionality of the code section was ever called into question.

The trial court charged concerning parties to a crime as follows:

> Every person concerned in the commission of a crime is a party thereto, and may be charged with and convicted of commission of the crime. . . . [A] person is concerned in the commission of a crime only if he. . . directly commits the crime, . . . intentionally

> aids, abets in the commission of a crime, or. . . intentionally advises, encourages, hires, counsels, or procures another to commit the crime.

(T. 1090).

The Court then went on to charge that the mere knowledge of a defendant of illegal acts which may have been committed does not make such a defendant a party to the crime. The court further charged that the mere fact that a defendant knew the other defendants during the time of the alleged criminal activity would not be sufficient to support the charge of

possession of controlled substances. (T. 1091). At no time was the trial court given the opportunity to rule on the constitutionality of the Georgia statute pertaining to parties to a crime.

In the instant case, the Court of Appeals of Georgia specifically noted that no constitutional objection was made at trial to either the charge or the statute and, thus, the court would not address the issue other than to note prior decisions by the Supreme Court of Georgia. Rickman v. State, 164 Ga. App. at 372.

Contrary to Appellant's assertion, this reasoning is supported by State procedural rules which bar the consideration on direct appeal of the constitutionality of a statute which

was not challenged at trial. The Court of Appeals of this State has decided that constitutional issues first raised on appeal present nothing for review by that court. Corley v. State, 154 Ga. App. 301, 268 S.E.2d 76 (1980). Prior to that time, the Supreme Court of Georgia had ruled that a constitutional question would not be considered by that court, because it was raised for the first time in a motion for new trial and, thus, came too late for review. Thrall v. State, 226 Ga. 308, 174 S.E.2d 925 (1970). Therefore, it is clear that there is a specifically established state procedural rule requiring that constitutional issues be raised at trial before the state Supreme Court will consider these issues.

It is further important to note that this appeal is not the Appellant's last opportunity to present this issue for review. As this Court has noted in its prior cases, a petition for a writ of habeas corpus in federal court is an available avenue for relief in these types of situations. Furthermore, Appellant has not sought to raise this issue in a state habeas corpus proceeding and could conceivably raise the issue at that time. See Hammock v. Zant, 243 Ga. 259, 253 S.E.2d 727 (1979). Therefore, Appellee submits that this Court does not have jurisdiction to consider the instant case as the state courts have not addressed the constitutional issue raised.

B. LACK OF A SUBSTANTIAL FEDERAL QUESTION.

Even if this Court concludes that the issue raised has been properly raised in the state courts, Appellee submits that this Court should dismiss the instant appeal or affirm the conviction based on the lack of a substantial federal question for consideration. It is essential to the jurisdiction of this Court under 28 U.S.C. § 1257 that a substantial federal question be properly raised in state court proceedings. The issue must be more than a mere formality and must not be frivolous or be foreclosed by prior decisions such as to leave no room for controversy. Appellee submits that the issue presented in

the instant case does not present such a substantial federal question as is required by law in order for this Court to exercise its jurisdiction.

Appellant has challenged O.C.G.A. §§ 16-2-20 and 16-2-21; Ga. Code Ann. §§ 26-801 and 26-802 as being unconstitutional. Appellant asserts that under the statutes providing for the conviction of a party to a crime, a person could not be on notice as to the nature of the charges against him or as to the punishment to which he would be submitted.

This Court has held:

> The constitutional requirement of definiteness is violated by a criminal statute

> that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

United States v. Harriss, 347 U.S. 612, 617 (1953). Subsequent to that decision, this Court again asserted the applicable principle stating, "we insist that laws give the person of ordinary intelligence a reasonable

opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

In reviewing the challenged statute under the above standards, it is clear that the statute sets forth with sufficient specificity conduct which is forbidden and sufficiently informs a defendant of conduct which would be prohibited by the law. See Wanzer v. State, 232 Ga. 523, 207 S.E.2d 466 (1974). Appellee submits that the statute challenged by the Appellant is clearly not vague and not overbroad and is sufficiently definite to protect a person of ordinary intelligence. The terms of the

statute furnish a test based on criteria known to men of common intelligence so that those who come in contact with the statute could determine the proscriptions of that statute with reasonable accuracy. Therefore, Appellee submits that the issue presented in the instant case is clearly frivolous as the statute is not unconstitutional in any manner. Therefore, no substantial federal question is presented for review by this Court.

PART THREE

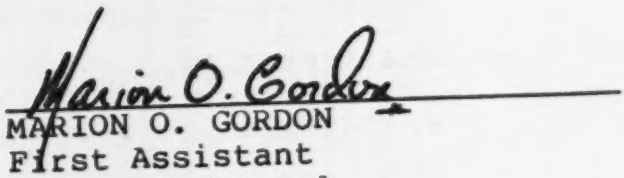
CONCLUSION

Appellee respectfully submits that no jurisdictional basis has been shown to justify this Court's consideration of this issue. Furthermore, Appellee submits that the question upon which this case depends is so insubstantial as to not need further argument. Therefore, Appellee moves this Court to either dismiss the instant appeal or, in the alternative, to affirm the judgment entered by the courts of Georgia.

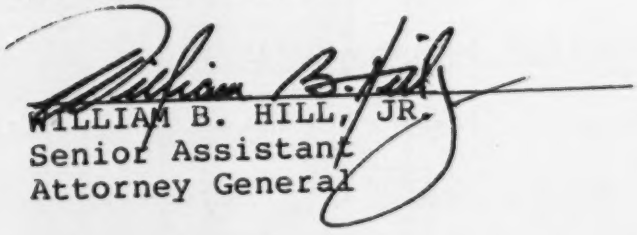
Respectfully submitted

MICHAEL J. BOWERS
Attorney General

(Signatures continued)



MARION O. GORDON
First Assistant
Attorney General



WILLIAM B. HILL, JR.
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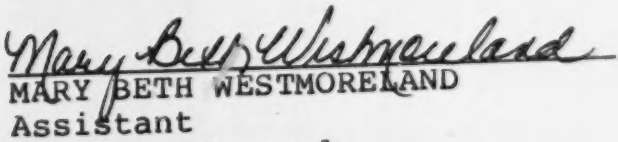

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Please serve:

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States and counsel of record for the Appellee, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Motion to Dismiss or Affirm upon counsel for the Appellant by depositing a copy of same in the United States mail with proper address and adequate postage to:

Robert L. Barr, Jr.
120 South Park Square
Marietta, Georgia 30060

This 24th day of May, 1983.

/s/
MARY BETH WESTMORELAND
Assistant
Attorney General

Office - Supreme Court, U.S.
FILED
MAY 31 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1727

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SAMUEL THOMAS RICKMAN,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

APPELLANT'S REPLY BRIEF

ROBERT L. BARR, JR.
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ATTORNEY FOR APPELLANT

NO. 82-1727

IN THE
SUPREME COURT OF THE UNITED STATES

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ROBERT L. BARR, JR.
120 South Park Square
Marietta, Georgia 30060
(404) 429-1442

ATTORNEY FOR APPELLANT

ISSUES DISCUSSED

I.

The State relies on a misinterpretation of the case law in arguing that the Appellant did not properly raise the question presented to this Court below.

II.

The State fails to show any legitimate interest in denying constitutional review in this Court of the question presented by Appellant.

III

Contrary to argument by the State, the highest Courts of the State of Georgia have, in fact, ruled on the constitutionality of the State law drawn into question by Appellant.

IV.

The State fails to address the substance of Appellant's arguments that the State law drawn into question is unconstitutional.

V.

The State fails to address the issue of improper application of the statute drawn into question by Appellant.

SUBJECT INDEX

	Page(s)
Issues Discussed.....	i
Subject Index.....	ii
Table of Authorities.....	iii
Jurisdiction.....	1
Argument.....	2
I. The State relies on a misrepresentation of the case law in arguing that the Appellant did not properly raise the question presented to this Court below.....	2
II. The State fails to show any legitimate interest in denying constitutional review in this Court of the question presented by Appellant.....	5
III. Contrary to argument by the State, the highest Courts of the State of Georgia have, in fact, ruled on the constitutionality of the State law drawn into question by Appellant.....	7
IV. The State fails to address the substance of Appellant's arguments that the State law drawn into question is unconstitutional.....	8
V. The State fails to address the issue of improper application of the statute drawn into question by Appellant.....	8
Conclusion.....	9
Certificate of Service.....	11

TABLE OF AUTHORITIES

	Page(s)
Cases	
Cardinale v. Louisiana, 394 U.S. 437 (1969).....	3, 4
Douglas v. Alabama, 380 U.S. 415 (1965).....	5
Evans v. State, 161 Ga.App. 468, 288 S.E.2d 726 (1982).....	9
Hammock v. Zant, 243 Ga. 259, 253 S.E.2d 727 (1979).....	6
Henry v. Mississippi, 379 U.S. 443 (1965).....	6
Rickman v. State, 164 Ga.App. 366, 296 S.E.2d 726 (1982).....	3, 4, 7
Wanzer v. State, 232 Ga. 523, 207 S.E.2d 466 (1974).....	3, 7
Wright v. Georgia, 373 U.S. 284 (1963).....	4
Statutes	
28 U.S.C. § 1257(2).....	4
Ga. Code Ann. § 26-801 (now, O.C.G.A. § 16-2-20).....	2, 3, 8
Ga. Code Ann. § 26-802 (now, O.C.G.A. § 16-2-21).....	2, 3 8

NO. 82-1727

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1982

SAMUEL THOMAS RICKMAN,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

APPELLANT'S REPLY BRIEF

JURISDICTION

Appellant, SAMUEL THOMAS RICKMAN, filed his Appeal from the Supreme Court of Georgia in this Honorable Court on April 22, 1983. Appellee, State of Georgia, filed its Motion to Dismiss or Affirm in this Court on or about May 20, 1983, the date on which Appellee certifies that a copy of said Motion was sent to attorney for Appellant. Pursuant to Rule 22.5, Rules of the Supreme Court of the United States, Appellant

submits this Reply Brief, addressing arguments first raised in Appellee's Motion to Dismiss or Affirm.

ARGUMENT

I. THE STATE RELIES ON A MISINTERPRETATION OF THE CASE LAW IN ARGUING THAT THE APPELLANT DID NOT PROPERLY RAISE THE QUESTION PRESENTED TO THIS COURT BELOW. (Ga. Code Ann. §§ 26-801 and 26-802 [O.C.G.A. §§ 16-2-20 and 16-2-21]).

As set forth in Appellant's Jurisdictional Statement, at trial Appellant objected to the substance of the unconstitutional manner in which the State was proceeding against him by way of use of the afore-cited parties to a crime statute and, at the first opportunity, when the parties to a crime statute was charged to the jury, objected to that charge. Moreover, Appellant clearly has raised the issue of the unconstitutionality of this State statute with the Appellate Courts of the State of Georgia; and this not even the State in its Motion to Dismiss or Affirm can deny. For example, the State, in

its Motion to Dismiss or Affirm, cites from the Court of Appeals of Georgia Opinion in this case the specific language by which the Georgia Court of Appeals recognizes that Appellant has raised this issue and wherein the Court of Appeals proceeds to "note that the Supreme Court [has] held that Code Ann. §§ 26-801 and 26-802 were not unconstitutionally vague, indefinite, and overbroad." Rickman v. State, 164 Ga.App. 366, 372, 296 S.E.2d 726 (1982); citing Wanzer v. State, 232 Ga. 523 (6), 207 S.E.2d 466 (1974).

The unconstitutionality, both on its face and as applied, of the Georgia parties to a crime statute has not only been presented to the highest courts of the State of Georgia, but has consistently been held to be constitutional in the face of such challenges. Id.

The State, in its Motion, cites the Opinion of the Supreme Court of the United States in Cardinale v. Louisiana, 394 U.S. 437 (1969) in support of its argument that this Court should not entertain Appellant's Appeal. See, Appellee's Motion to Dismiss or Affirm at 12. The State's reliance on this case is wrong. Cardinale v. Louisian, id., is in no way relevant to the case sub judice, wherein the issue was raised in the State Courts below and all lower Courts have held against Appellant; hence, Appellant's direct Appeal

pursuant to 28 U.S.C. § 1257(2). Cardinale, id., on the other hand, stands for the proposition that when the appellant to the Supreme Court of the United States has not raised a question in any lower State Court in any manner whatsoever, but raises it for the very first time on Appeal to this Court, the matter will not be reviewed. Id. 394 U.S. 437, 438.

Appellant is not asking this Court to review a matter which has not been raised at all in the State Courts. Even if the Court were to agree with Appellee that Appellant is prejudice because he did not raise the attack on the State statute at issue in the precise language and format, and at the specific time deemed appropriate by the State, it is obvious that the constitutionality of the statute at issue here has been drawn into question at the Appellate Courts in the State of Georgia, wherein the statute has been held to be constitutional. Rickman v. State, 164 Ga.App. 366, 372, 296 S.E.2d 726 (1982).

To Appellant, the State's argument in its Motion to Dismiss or Affirm is yet another example of the manner in which the State of Georgia attempts to skirt constitutional review of its State statutes by the Supreme Court of the United States. Wright v. Georgia, 373 U.S. 284 (1963); see also, other cases raised by Appellant at pp.

9-17, Appellant's Jurisdictional Statement.

II. THE STATE FAILS TO SHOW ANY LEGITIMATE INTEREST IN DENYING CONSTITUTIONAL REVIEW IN THIS COURT OF THE QUESTION PRESENTED BY APPELLANT.

In its Motion to Dismiss or Affirm, the State of Georgia does not even address, much less establish, a legitimate State interest in denying the constitutional review of the State statute drawn into question by Appellant. Perhaps if the State of Georgia could or would show a legitimate State interest to be served by its reliance on procedural rules to deny a constitutional attack on its statute, review by this Court might be circumvented. Douglas v. Alabama, 380 U.S. 415, 422 (1965). Simply repeating the hollow and conclusory statements that the Georgia parties to a crime statute is "not unconstitutional" as did the Court of Appeals of Georgia in rendering its decision below, the State utterly fails to meet its burden in attempting to deny constitutional review of the statute at issue by this Court, in the face of Appellant's Jurisdictional Statement.

Moreover, these jurisdictional issues themselves are properly reviewable by the Supreme Court of the United States. Henry v. Mississippi, 379 U.S. 443, 447 (1965); citing, Love v. Griffith, 266 U.S. 32, 32-34 (1924).

The State attempts to wind its way out of having to address the issue by stating that Appellant had an appropriate State remedy still at his disposal -- habeas corpus -- and that, therefore, it really does not matter whether the statute is unconstitutional or not. See, Appellee's Motion to Dismiss or Affirm at 20. In this conclusion, the State is wrong.

The State cites Hammock v. Zant, 243 Ga. 259, 253 S.E.2d 727 (1979), in support of its proposition that Appellant should properly raise these matters in a State habeas corpus proceeding rather than by way of Appeal to the Supreme Court of the United States. However, the Supreme Court of Georgia held, in Hammock, id., that a writ of habeas corpus clearly cannot be used as a writ of error. In other words, Appellant cannot in Georgia properly use a habeas corpus proceeding to correct errors of law once he has raised these issues with the Georgia Courts and had them decided against him. The issues are then res judicata and cannot be raised collaterally on a habeas. Id. In the case sub

judice, Appellant has drawn into question the constitutionality of the Georgia parties to a crime statute, and on Appeal has had the issues denied by the Court of Appeals and the Supreme Court of Georgia. The issue properly is before this Court and not a lower State Court on a habeas proceeding.

III. CONTRARY TO ARGUMENT BY THE STATE THE HIGHEST COURTS OF THE STATE OF GEORGIA HAVE , IN FACT, RULED ON THE CONSTITUTIONALITY OF THE STATE LAW DRAWN INTO QUESTION BY APPELLANT.

Contrary to argument by the State in its Motion to Dismiss or Affirm, the highest Courts of the State of Georgia have ruled on, and have held to be constitutional, the Georgia parties to a crime statutes, specifically in this case finding that:

> "The Supreme Court [has] held that [the parties to a crime statutes] were not unconstitutionally vague, indefinite and overbroad." Rickman v. State, 164 Ga.App. 366, 372, 296 S.E.2d 726 (1982); citing, Wanzer v. State, 232 Ga. 523 (6), 207 S.E.2nd 466 (1974).

IV. THE STATE FAILS TO ADDRESS THE SUBSTANCE OF APPELLANT'S ARGUMENTS THAT THE STATE LAW DRAWN INTO QUESTION IS UNCONSTITUTIONAL.

Appellant raised extensive, substantive arguments that the Georgia parties to a crime statutes are unconstitutional on their face. Appellant cited extensively from legislative history and case law concerning these statutes, codified in Georgia as Ga. Code Ann. §§ 26-801 and 26-802 (now, O.C.G.A. §§ 16-2-20 and 16-2-21). In its Motion to Dismiss or Affirm, the State merely recites earlier conclusions of law and presents to the Court irrelevant language on the general issue of notice to a defendant. This is clearly an unsatisfactory response to substantive and important constitutional issues raised by Appellant, which, Appellant respectfully urges, mandates review of this statute on constitutional terms, by this Court.

V. THE STATE FAILS TO ADDRESS THE ISSUE OF IMPROPER APPLICATION OF THE STATUTE DRAWN INTO QUESTION BY APPELLANT.

Appellant argued in his Jurisdictional Statement that the Georgia parties to a crime statute has been and continues to be widely misapplied not only in his case but in numerous other cases. For example, it is being used as a conspiracy statute in circumvention of its intended legislative purpose, and in an effort to obtain convictions on a conspiratorial basis without having to establish the elements of conspiracy, which the State cannot do once the substantive crime charged has been proved. Evans v. State, 161 Ga.App. 468, 471, 288 S.E.2d 726 (1982); see also, cases cited by Appellant in his Jurisdictional Statement at pp. 22-29.

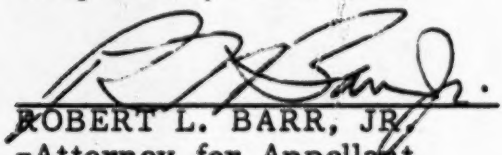
If the State deems this issue unimportant, or cannot meet the elements of Appellant's constitutional attack on the Georgia parties to a crime statute, then Appellant's assertions certainly must be addressed by this Court, a fortiori in light of the fact that the State has failed to rebutt them.

CONCLUSION

Appellant submits that the issues presented to this Honorable Court in his Jurisdictional Statement are properly before this Court, have not been addressed, must less rebutted by the State of Georgia in its Motion

to Dismiss or Affirm, and that the State has failed to show the issue should not be before this Court. Nor has the State shown in any manner other than recitation of earlier conclusory statements, that the issues presented are not substantial. Appellant respectfully shows that the issues which he has presented in his Jurisdictional Statement should be decided by this Court as they raise substantial questions of constitutional law.

Respectfully submitted,



ROBERT L. BARR, JR.
-Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CETIFY that I have this date served three (3) true and correct copies of the foregoing Appellant's Reply Brief, by United States mail, postage prepaid, upon:

Mary Beth Westmoreland,
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

and one (1) true and correct copy upon:

James T. Martin, Esq.
Assistant District Attorney
Cobb Judicial Circuit
P. O. Box 649
Marietta, Georgia 30061

This 31st day of May, 1983.

ROBERT L. BARR, Jr.
-Attorney for Appellant